

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Innovation in the Broadcast Television Bands:)	ET Docket No. 10-235
Allocations, Channel Sharing and)	
Improvements to VHF)	

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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SUMMARY

The New Jersey Division of Rate Counsel supports the efforts of the Federal Communications Commission to “repurpose” a portion of the UHF and VHF frequency bands for later use by fixed and mobile wireless communications services, including mobile broadband. Such reallocation, however, should occur in a manner that does not jeopardize the FCC’s commitment to program diversity and local programming by broadcasters. Furthermore, simply freeing up additional spectrum will not necessarily lead to reasonable prices for and high quality of wireless service. As Rate Counsel has explained in its comments in the FCC’s “bill shock” proceeding, the increasingly concentrated wireless industry is not sufficiently competitive to yield reasonable rates and adequate service quality. Therefore an integral element of the FCC’s spectrum policy should be to monitor the wireless industry to ensure that consumers benefit fully and fairly from spectrum – which is a public good. Rate Counsel also supports the Commission’s proposed rules that seek to protect over-the-air (“OTA”) television as a “healthy medium” and to improve the reception of VHF television service.

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I. INTRODUCTION

On November 30, 2010, the Federal Communications Commission (“FCC”) released a notice of proposed rulemaking regarding the “repurposing of a portion of the UHF and VHF frequency bands” for later use by fixed and mobile wireless communications services, including mobile broadband.¹ The New Jersey Division of Rate Counsel (“Rate Counsel”) submits these comments pursuant to the schedule published in the Federal Register.²

A. INTEREST OF RATE COUNSEL IN THE INSTANT PROCEEDING.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and

¹ / Notice of Proposed Rulemaking, ET Docket No. 10-235, In the Matter of Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, released November 30, 2010 (“NPRM”).

² / Federal Register, Vol. 76, No. 21, February 1, 2011, 5521. Reply comments are due April 18, 2011. *Id.*

judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996³ and the American Recovery and Reinvestment Act of 2009.⁴

The outcome of this proceeding is important to New Jersey consumers because the rules that the FCC eventually issues could affect the prices for and quality of broadband wireless service, and also could affect the quality and diversity of OTA television.

II. BACKGROUND

With its NPRM, the FCC seeks to address increasing demand for wireless broadband service, to encourage innovation and investment in the mobile industry, and to free up new spectrum for broadband service.⁵ Specifically, the NPRM seeks to "repurpose" a portion of the UHF and VHF frequency bands, which broadcast television service now uses. The FCC also seeks to protect over-the-air OTA TV "as a healthy, viable medium."⁶ The NPRM seeks to facilitate wireless broadband uses of the UHF and VHF bands, while maintaining license assignments in the bands that now exist.⁷

These UHF and VHF bands now occupy 294 megahertz of spectrum, and all are currently allocated for broadcasting services.⁸ The FCC's National Broadband Plan recommends that 500 megahertz of spectrum between 225 MHz and 3.7 GHz be made available to meet the needs of mobile, fixed and unlicensed wireless broadband in the next ten years and that 300 megahertz of

³ / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934.

⁴ / American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("ARRA").

⁵ / *NPRM*, para. 1.

⁶ / *Id.*

⁷ / *Id.*, at para. 2.

⁸ / *Id.*, at para. 5.

that amount be for mobile flexible uses within 5 years, of which as much as 120 megahertz would come from the broadcast television bands.⁹ The FCC has been actively examining options for broadband spectrum, for example, in a Technical Paper released in June 2010,¹⁰ and also in a Broadcast Engineering Forum, held also in June by the FCC's Office of Engineering and Technology.¹¹ The FCC has also developed a model for optimizing the assignment of channels to television stations.¹² The FCC is concerned that "[w]ithout additional spectrum, users of mobile services will be faced with congestion and degraded service, or much higher prices, or both."¹³

III. NPRM

Bands under consideration

The FCC's Technical Paper states that the "spectrum occupied by broadcast television stations, particularly in the UHF band, has excellent propagation characteristics that make it well-suited to the provision of mobile broadband services in both urban and rural areas."¹⁴ The FCC is considering reallocating low VHF spectrum associated with 54-72 MHz (TV channels 2-4) and 76-88 MHz (TV channels 5 and 6), the high VHF spectrum at 174-216 MHz (TV channels 7-13); and the UHF bands at 470-608 MHz (TV channels 14-36) and 614-698 MHz

⁹ / *Id.*, at para. 4, citing *Connecting America: The National Broadband Plan*, FCC, March 2010. The FCC developed the National Broadband Plan pursuant to Congressional directive in the ARRA.

¹⁰ / "Options for Broadcast Spectrum," OBI Technical Paper No. 3, Federal Communications Commission, June 2010, [http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-\(obi\)-technical-paper-spectrum-analysis-options-for-broadband-spectrum.pdf](http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-spectrum-analysis-options-for-broadband-spectrum.pdf) ("Technical Paper").

¹¹ / *NPRM.*, at paras. 8-9.

¹² / *Id.*, at para. 10.

¹³ / *Id.*, at para. 11.

¹⁴ / Technical Paper, at 6.

(TV channels 38-51) (referred to by the FCC and in these comments as “the “U/V bands”).¹⁵

The FCC proposes three actions to enable wireless broadband uses of these U/V Bands:

1. The FCC proposes to add new allocations for fixed and mobile services in the U/V Bands “to be co-primary with the existing broadcasting allocation in those bands.”
2. The FCC proposes to allow two or more television stations to share a single six-megahertz channel, to facilitate efficient use of the U/V Bands.
3. The FCC plans “to consider approaches to improve service for television viewers and create additional value for broadcasters by increasing the utility of the VHF bands for the operation of television services.”¹⁶

As proposed by the FCC, those stations that voluntarily agree to share a channel would relinquish part of their bandwidth to an incentive auction, and then would receive some level of compensation for the revenues that would result from the auction of the newly available spectrum.¹⁷

Preliminary analysis of issues raised by the NPRM.

Rate Counsel fully supports the FCC’s “intention to provide for an orderly transition of a portion of the U/V Bands to flexible use” and also supports the FCC’s goal of establishing a transition that will “minimize any impact on over-the-air television broadcasting and the consumers it serves.”¹⁸ As the FCC’s Technical Paper states: “Free, OTA TV has served longstanding policy goals including competition, diversity, localism and emergency communications. Elderly, rural, African American, Hispanic and other minority populations

¹⁵ / *NPRM*, at para. 2.

¹⁶ / *Id.*

¹⁷ / *Id.*, at para. 8; Technical Paper, at 1.

¹⁸ / *NPRM*, at para. 14.

heavily rely upon free, OTA TV.”¹⁹ Therefore, in its effort to free up spectrum, the FCC should take steps to minimize any adverse impact on those who rely on free OTA television. On the other hand, African Americans and Hispanics disproportionately rely on mobile broadband for their access to the Internet.²⁰ Clearly the FCC has differing public interest criteria to balance as it develops rules in this proceeding, including ensuring both the continuing quality of OTA television and sufficient capacity for wireless broadband.

Spectrum Allocation

Rate Counsel supports the FCC’s proposed changes to the U.S. Table of Frequency Allocations in Section 2.106 of the rules to enable it to make a significant portion of the spectrum that is currently used for broadcast television available for flexible use.²¹ Furthermore, Rate Counsel supports a plan that continues to support the needs of television service.²²

Broadcast Television Channel Sharing

The FCC seeks comment “on the development of an appropriate regulatory structure for voluntary television channel sharing that will preserve over-the-air television as a healthy, viable medium going forward, in a way that would benefit consumers overall, while establishing mechanisms to make available spectrum for flexible broadband uses.”²³ Rate Counsel also supports the FCC’s vision of an approach to channel sharing²⁴ that provides existing small- and minority-owned stations an opportunity to use cost savings and new income from such an

¹⁹ / Technical Paper, at 1.

²⁰ / *Id.*, citing John B. Horrigan, “Broadband Adoption and Use in America,” OBI Working Paper Series No. 1, February 2010, at 22 (Exhibit 14).

²¹ / *NPRM*, at para. 16.

²² / *Id.*, at para. 17.

²³ / *Id.*, at para. 18.

²⁴ / The FCC’s Technical Paper defines channel sharing as involving “two or more stations combining their transmissions to share a single six-megahertz channel.” Technical Paper, at 14.

arrangement to support new and enhanced local program offerings.²⁵ It is not clear from the NPRM, however, how consumers could be assured that such benefits would actually occur. Rate Counsel urges the FCC to seek or to require specific commitments to local and to diverse programming.

Rate Counsel further supports the FCC's intention that, with channel sharing, each station's own programming obligations would continue.²⁶ The FCC seeks comment "on how television broadcast stations can most effectively coordinate their individual rights and responsibilities while operating" under the sharing arrangement that the FCC proposes.²⁷ Rate Counsel may address this matter in reply comments.

In response to the FCC's question, Rate Counsel does not oppose the sharing of a single television channel by commercial and noncommercial educational ("NCE") stations because, as explained by the NPRM, there would be no overlap of programming between the two stations.²⁸ Furthermore, an NCE television station that shares a channel with a commercial television station should not lose its NCE status.²⁹ The FCC also seeks comment on the way in which to assess any prospective loss of television service when it is determining whether to allow stations to modify their transmission facilities in order to enable channel sharing.³⁰ Rate Counsel acknowledges the inevitable need for the FCC to have the flexibility to assess the relative

²⁵ / *NPRM*, at para. 18.

²⁶ / *Id.*, at para. 21.

²⁷ / *Id.*

²⁸ / *Id.*, at para. 24.

²⁹ / *Id.*, at para. 35.

³⁰ / *Id.*, at paras. 25-28.

possible service loss and possible gains such as the deployment of on-channel Digital Transmission Systems (“DTS”) or other measures that restore service.³¹

Regarding the FCC’s request for comment on the implications of channel sharing for the local TV ownership rule, the radio/TV cross-ownership rule and the newspaper/broadcast cross-ownership rule,³² Rate Counsel urges the Commission to adopt the promotion of diversity in programming as a guiding criterion in this rulemaking. In other words, as the FCC evaluates potential channel sharing arrangements, the FCC should explicitly assess the implications of each such proposed channel sharing arrangement on program diversity, and ensure that, in its effort to repurpose spectrum, the FCC does not allow programming diversity to erode.³³ In recent years, there has been a substantial and devastating loss of diversity – consumers should not be forced to sacrifice programming diversity in order to facilitate spectrum reallocation.³⁴

Rate Counsel supports the FCC’s proposal that those stations that voluntarily elect channel sharing retain their existing rights to mandatory carriage.³⁵ Any new channel sharing framework should not affect broadcasters’ carriage rights.³⁶

Improving reception of VHF TV Service.

Rate Counsel supports fully the FCC’s efforts to improve the reception of VHF TV service. As the FCC explains in its Technical Paper:

³¹ / *Id.*, at para. 11.

³² / *Id.*, at para. 29.

³³ / The FCC’s Technical Paper recommends that for any approach for implementing the voluntary reallocation of broadcast spectrum through incentive auctions, “the FCC would implement safeguards, determined as part of the rulemaking proceeding, to maintain its longstanding goals of competition, diversity and localism.” Technical Paper, at 25. Rate Counsel fully supports the establishment of such safeguards.

³⁴ / *See, e.g.*, Rate Counsel’s submissions in the FCC’s Comcast/NBCU proceeding. In the Matter of Joint Application by GE and Comcast for Transfer of Control of Licenses from GE to Comcast, MB Docket No. 10-56, reply comments, July 21, 2010, *ex parte* filing, December 13, 2010.

³⁵ / *NPRM*, at para. 30.

³⁶ / *Id.*, at para. 31.

Currently, broadcast TV stations in the VHF bands are experiencing reception issues after the Digital Television (DTV) transition due to low antenna gain, fading, weak signal levels and environmental noise from other electronic devices in homes. To ensure the most efficient use of the VHF bands, the FCC should first work to address these reception issues so that TV stations can continue broadcasting in the lower and upper VHF bands.³⁷

The adoption of new technology (in this instance digital television) by some consumers should not jeopardize the quality of the technology of those who have not yet chosen to make a technological transition. Therefore, Rate Counsel supports the FCC's efforts to address television reception issues.

The FCC indicates that VHF TV reception difficulties apparently are most common for consumers using indoor antennas.³⁸ The FCC is considering the possibility of indoor antenna performance standards.³⁹ The FCC is also considering an increase in the signal-to-noise ("S/N") ratio by raising the transmitted power, that is the effective radiated power ("ERP").⁴⁰ The FCC raises issues for comment related to its consideration of increases in the power limits for digital television stations on VHF channels.⁴¹ According to the NPRM, some stations operating on high-VHF channels have improved their service by increasing their transmitted power.⁴² Rate Counsel welcomes industry solutions to the problem of VHF TV reception.

Market valuation should not overshadow public interest goals.

³⁷ / Technical Paper, at 6-7.

³⁸ / *NPRM*, at para. 43.

³⁹ / *Id.*, at paras. 46, 54-56.

⁴⁰ / *Id.*, at para. 48.

⁴¹ / *Id.*, at paras. 48-53.

⁴² / *Id.*, at para. 48.

Rate Counsel acknowledges the declining market valuation of OTA TV,⁴³ but urges the FCC to ensure that any FCC efforts to “maximize” the value of spectrum not overshadow the FCC’s historic commitment to public interest criteria in spectrum allocation. Ultimately, any reallocated spectrum should be used for the public interest. Among other things, if spectrum is to be allocated to mobile broadband, the FCC should ensure that the FCC takes steps to monitor the prices and quality of mobile broadband service.⁴⁴ One of the reasons that OTA broadcasting has a lower market valuation than mobile broadband is precisely because of the public interest “encumbrances” associated with OTA broadcasting.⁴⁵ As the FCC takes steps to reallocate spectrum to the rapidly growing mobile broadband market, it should not lose sight of public interest goals, the achievement of which might “encumber” industry, but which are essential to society. Spectrum is a public good, and therefore, those industry providers who benefit from spectrum reallocation should be required to assist the FCC in meeting public interest goals. The FCC explains in its Technical Paper:

Free, OTA television provides significant public benefits to the American communications landscape. First, it is a free service for those viewers that seek an alternative to subscription- based cable or satellite television. OTA-only households include segments of the population that either cannot afford or do not desire paid television services, or cannot receive those services at their homes. Providing those Americans with access to free television constitutes a core principle of American mass communications policy. Second, OTA television

⁴³ / According to the FCC’s Technical Paper, the total broadcast TV industry enterprise value is \$63.7 billion, and the OTA share represents between 14% and 19% of that value. Technical Paper, at 7. The percent of households viewing television solely through OTA broadcasting declined from 24% in 1999 to 10% in 2010. *Id.*

⁴⁴ / For example, there have been problems recently with the reliability of wireless networks during snowstorms. On February 18, 2011 the FCC posted a news release indicating that the FCC’s Public Safety and Homeland Security Bureau (“Bureau”) requested that Verizon provide an assessment to the FCC as to why approximately 10,000 wireless calls were blocked because of circuit failure. http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0218/DOC-304751A1.pdf. On February 17th, the Bureau sent a letter to Verizon expressing concern that approximately 8,300 wireless 911 calls to Public Safety Answering Points (PSAPs) in Montgomery County, Maryland were not connected as well as 1,700 calls in Prince George’s County, Maryland. The full text of the letter from the Bureau to Verizon is available at: http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0218/DA-11-328A1.pdf

⁴⁵ / Technical Paper, at10.

comes with programming obligations that serve the public interest. These include children's educational programming, coverage of local community news and events, reasonable access for federal political candidates, closed captioning and emergency broadcast information. Internet-only media outlets and MVPDs are not subject to similar public-interest obligations. Through broadcast television, the FCC has pursued longstanding policy goals in support of the Communications Act, such as localism and diversity of views. Both commercial and non-commercial broadcast TV stations serve these policy goals and public interests.⁴⁶

Mobile broadband also yields public benefits including, for example, innovative journalism and improved public safety capabilities.⁴⁷ However, as the nation continues its transition away from traditional OTA broadcasting, it is important that traditional public interest goals not be abandoned.

Rate Counsel is also concerned about the implications for wireless consumers of the \$33 billion price-tag for the newly available spectrum, which would be generated from auctions.⁴⁸ Wireless carriers presumably would recover these new costs in prices charged to wireless customers, jeopardizing the affordability of wireless services. Instead, to further the public interest, the FCC should consider making the spectrum (which is a public good) available without some form of credits to those wireless providers that can demonstrate they will offer wireless service at affordable rates. If the FCC does not adopt this recommendation, Rate Counsel urges the FCC to allocate the \$33 billion toward ensuring affordable, ubiquitous broadband service.⁴⁹

⁴⁶ / *Id.*

⁴⁷ / *Id.*

⁴⁸ / "Broadcast Spectrum Incentive Auctions White Paper," prepared by CTIA: The Wireless Association and Consumer Electronics Association, February 15, 2011, at 2, 7.

⁴⁹ / In the National Broadband Plan, the FCC addresses some of the budgetary implications of its proposed relocation of spectrum as follows: "Budget Impact of Plan. Given the plan's goal of freeing 500 megahertz of spectrum, future wireless auctions mean the overall plan will be revenue neutral, if not revenue positive. The vast majority of recommendations do not require new government funding; rather, they seek to drive improvements in government efficiency, streamline processes and encourage private activity to promote consumer welfare and national priorities. The funding requests relate to public safety, deployment to unserved areas and adoption efforts. If

IV. CONCLUSION

Rate Counsel fully supports the FCC's efforts to provide more flexible and more efficient use of the U/V bands spectrum, while minimizing the impact on over-the-air television broadcasting.⁵⁰ As described by Chairman Genachowski in his statement accompanying the NPRM, "[t]he roughly 300 Mhz of spectrum in the TV bands is among the most robust available."⁵¹ Rate Counsel also fully supports efforts to prevent degradation or increases in prices for wireless services. Rate Counsel has stated in the past, and reiterates its ongoing concern that the wireless industry has been experiencing significant market concentration, and, therefore, an integral element of the Commission's wireless policy should be to monitor the prices and practices of wireless carriers.⁵² While it is prudent to take steps to allocate spectrum more efficiently in order to accommodate consumers' exponentially growing demand for wireless services, it is also imperative that the FCC retain and exercise oversight of the rates, terms, conditions, and quality of wireless services. Measures to improve spectrum allocation should benefit consumers as well as carriers. Rate Counsel urges the Commission to ensure that its wireless policy not focus on spectrum issues to the exclusion of consumer issues, such as the pricing and quality of service actually rendered by wireless providers to consumers.⁵³ Spectrum is a public good – therefore the benefit of any repurposing of spectrum should inure to consumers.

the spectrum auction recommendations are implemented, the plan is likely to offset the potential costs." National Broadband Plan, Executive Summary, at xv.

⁵⁰ / See NPRM, at paras. 12-14.

⁵¹ / NPRM, Statement of Chairman Julius Genachowski, at 38.

⁵² / In the Matter of Empowering Consumers to Avoid Bill Shock, CG Docket No. 10-207, Consumer Information and Disclosure, CG Docket No. 09-158, initial and reply comments submitted by Rate Counsel, January 10, 2011 and February 8, 2011.

⁵³ / See NPRM, Statement of Commissioner Michael J. Copps, at 41.

Any changes that the FCC adopts in this rulemaking proceeding should ensure that the public interest is protected and should lead to improved service for consumers. Maximizing spectrum performance while also acknowledging and taking into account the public value of free-to-all, over-the-air television are key, but likely at times competing, goals, which will require the FCC to ensure that it is properly “weighing the needs and requirements of today and tomorrow.”⁵⁴

Respectfully submitted,

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⁵⁴ / *Id.*, at 40.